ROSITA HILLS LTD.

IBLA 72-434 Decided April 25, 1973

Appeal by Rosita Hills Ltd. from a decision of the Canon City District Manager, Bureau of Land Management, dated April 27, 1972, rejecting its application for a grazing lease.

Set aside and remanded.

Grazing Leases: Preference Right Applicants

A preference right applicant for a grazing lease under section 15 of the Taylor Grazing Act must show that he needs the land applied for to make proper use of his contiguous land; if he cannot do so he is not entitled to a preference right lease.

Grazing Leases: Applications

Conflicting applicants for a grazing lease under section 15 of the Taylor Grazing Act who are in the same category of consideration set out in the pertinent regulation will be given an opportunity to divide the area in conflict by agreement, before the District Manager makes an allocation.

APPEARANCES: David I. Folkman, Managing Partner, Rosita Hills Ltd. pro se.

OPINION BY MR. RITVO

Rosita Hills, Ltd., has appealed from a decision of the Canon City District Manager, Bureau of Land Management, which rejected its application, Canon City 4115, of March 24, 1972, for a grazing lease to be issued pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1970). The application was in conflict with that of Marlene J. LeMoine Kunz, filed on January 24, 1972. The application of Rosita Hills, Ltd., is in conflict with that of Mrs. Kunz as to lands in approximately 440 acres, in sec. 24, T. 22 S., R. 72 W., and sec. 19, T. 22 S., R. 71 W., in the Canon City District, Colorado, which constitute all the land in Rosita's application. Mrs. Kunz's application covers an additional 40 acres in sec. 20, T. 22 S., R. 71 W., 6th P.M., Colorado.

Section 15, supra, authorizes the Secretary of the Interior, in his discretion, to lease for grazing purposes certain public land not within an established grazing district. Owners of contiguous private land have a preference right to a lease if certain requirements are met. Both Rosita and Mrs. Kunz claimed to be preference right applicants.

Rosita claims a preference right to a grazing lease based on land acquired through the purchase from John Selby Young. Young held lease Colorado 5-10228 to graze cattle on the federal range on a ten-year term basis. Watson, a partner of Rosita, informed the Bureau by letter dated February 18, 1971, of the purchase of Young's land and of Rosita's desire to maintain grazing privileges. The Bureau, by letter dated February 22, 1971, informed Watson what steps would need be taken to apply for an assignment of grazing privileges. Apparently receiving no reply from Young or Rosita within the 90 days required by 43 CFR 4125.1-2(a), the Bureau issued a "Show Cause Notice" to Young, dated October 6, 1971, holding the grazing lease for cancellation.

Young forwarded a letter, which was unacceptable to the Bureau, as an answer to the "Show Cause". However, by letter dated October 14, 1971, Watson stated that Rosita intended to apply for a recreational lease of the land as soon as it had completed development work. Since an adequate showing was not made, the Bureau by decision of November 8, 1971, canceled Young's grazing lease. The land thereby reverted to unleased federal land.

The land Rosita purchased covers 140 acres, constituting roughly the W 1/2 SW 1/4, NE 1/4 SW 1/4 and NW 1/4 SE 1/4 sec. 19, supra. The land applied for in section 19 abuts it in the east, south and north, while the land in section 24, supra, borders it to the west. Mrs. Kunz owns 22 acres of land in the NW 1/4 NW 1/4 sec. 29, T. 22 S., R. 71 W. She acquired her land by deed dated July 26, 1971. The 40 acres that she applied for, which are not in conflict, are in sec. 20 directly to the north.

The evidence indicates Rosita purchased the ranch from Young to subdivide and sell to individual owners probably for resort or investment property. Rosita did not initially intend to go into the livestock business but wanted to prevent the "nuisance" of cows grazing near or into its lands. The land in question provides 59 AUMs of forage, which would permit the grazing of nine cows over a six month period.

Reasons given for rejection were that: "* * * the base lands described on the Rosita Hills, Ltd., application will have an uncertain tenure and would not contribute to a stabilized livestock operation * * *"; and that the applicant had questionable need of the public lands to support a livestock operation.

Rosita stated as reasons for the appeal: (1) Rosita's subdivision activity will not deter it from the use of the subject BLM land for an established cattle operation; (2) Rosita would be burdened with a high cost for fence replacement as a result of Colorado laws which require cattle to be fenced "out" rather than "in"; (3) Mrs. Kunz's grazing privileges would not be affected adversely; (4) Rosita would expend its best efforts to provide for wildlife protection in the area.

The land Rosita applied for had been grazed by Young under a section 15 lease from 1966, and before then by his predecessor. It is fenced on the east, north and west. The fence separates it from both Mrs. Kunz's private land and the 40 acres she has applied for which are not in conflict.

Young's livestock operation included other contiguous land he owned in sections 29, 30, 31, and 32, T. 22 S., R. 71 W., 6th P.M., Colorado.

The first issue is whether either of the applicants is a preference right applicant. Section 15, supra, states:

> * * * That preference shall be given to owners * * * of contiguous land to the extent necessary to permit proper use of such contiguous land.

As the Department has emphasized, section 15 grants a preference right to owners or occupants of contiguous lands only "to the extent necessary to permit proper use of such contiguous land." [Emphasis added.] In Claude G. Burson and Ellsworth E. Brown, 59 I.D. 539 (1947), it was said:

> * * * the degree of preference to be given to competing lawful occupants of contiguous lands must be commensurate with the degree of need which the contiguous base lands of the respective occupants have for the lease lands if the base lands are to be put to proper use for the grazing of livestock by such occupants. Not only must the

> base lands be contiguous to the lease lands, but the lease lands must be necessary to the base lands, complementing them and supplying their deficiencies in order to insure their proper use for the occupant's own grazing operations. [P. 542]
>
> In summary, therefore, it is apparent that the preference right to a grazing lease accorded by the second provision of section 15 depends upon three essential qualifications pertaining to the base lands, namely, their non-public-land status, their contiguity to the lease lands, and their need for the lease lands. Of these three qualifications no single one is by itself sufficient to create a preference claim. The preference right springs only from the coexistence of all three conditions, and, if one of these be lacking, there is no preference right. [P. 544]

Since both applicants own nonpublic land contiguous to the public land in conflict, the third element of a preference right is the crucial one, that is, the extent to which the public lands are necessary to permit proper use of the contiguous land. The proper use must be a use of federal land which complements the use of the private land and not merely supplements it. John Conover, Jr., A-30769 (August 31, 1967); Winchester Land and Cattle Company, 65 I.D. 148, 154-156 (1958). It is not enough that private lands are used for the same purposes as the public lands; the use of public lands must in some manner be necessary to the proper use of the contiguous land. Id. For example, if both the contiguous lands and the public are used for summer grazing the use is merely supplementary and does not entitle the contiguous land to a preference right.

Rosita's contiguous lands were part of a much larger tract held by its grantor. The record indicates that its grantor cultivated by irrigation a major portion of the private land and conducted a cattle operation of 100 head. The land Rosita purchased was not irrigated, but was part of the fenced area used for summer grazing. There is no indication in the record that Rosita needs the public land to permit proper use of its contiguous land for grazing. Rather it seems apparent that Rosita would use the public land merely as an extension of the summer grazing for which its own land is suitable. Thus the use of the public land would only supplement and not complement the use of the contiguous land. As we have seen, such use is not enough to earn Rosita a preference right.

Turning now to Mrs. Kunz, we note, as we have stated, that she purchased 21 acres in 1971. There is no conflict over her having a lease for the 40 acres immediately north of her tract. However,

the record contains nothing about the use of her contiguous land other than a statement in her first application that she owned five head of cattle. When she amended her application to include the land in conflict, she said that she owned no cattle at that time, but planned to purchase some. There is nothing in the record to indicate in what way the 400 plus acres in conflict are necessary to permit proper use of her 21 acres of contiguous land for grazing purposes.

Therefore on the record as it now stands, we find that neither of the applicants is entitled to a preference right to a grazing lease for the lands in conflict.

The pertinent regulation sets out three categories of applicants and directs that leases be issued to them in the following order, (1) preference right applicants as discussed above (2) applicants owning non-contiguous land to the extent necessary to permit the proper use of such non-contiguous land, and (3) other applicants.

So far as the record shows, both Rosita and Mrs. Kunz fall into the third category.

The regulation further provides that when more than one qualified applicant applies for the same land and it appears that a division of the area may be made which will not result in improper land use, the authorized Officer will allow the applicants an opportunity to agree to a division of the land. 43 CFR 4121.2-1(d)(1).

Absent other factors, we believe the case should be remanded to give the conflicting applicants an opportunity to arrive at an acceptable division of the area in conflict.

If the parties cannot reach an acceptable agreement, the District Manager will allocate the land on the basis of one or all of the factors set out in the pertinent regulation. 43 CFR 4121.2-1(d)(2).

The District Manager adverted to Rosita's plans to subdivide its tract as an indication that its livestock operation would be of uncertain tenure and might not be stabilized. He also commented that Rosita's intention to subdivide the land threw some doubt on the dependency of the land on the public land to support a livestock operation.

Rosita says it plans to keep its holding intact at least until 1982. If the small scale of any operation proposed by either Mrs. Kunz or Rosita is taken into account, a 10-year period seems sufficient for the use that will be made of the public lands by either.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the District Manager is set aside and the case remanded for further proceedings consistent herewith.

Martin Ritvo, Member

We concur:

Joseph W. Goss, Member

Anne Poindexter Lewis, Member.